IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1904

No. 117

FRANK D. THOMPSON
TRUSTEE IN BANKRUPTCY OF
HERBERT E. MOORE, BANKRUPT
PLAINTIFF IN ERROR

vs.

HENRY FAIRBANKS

IN ERROR TO THE SUPREME COURT OF THE STATE OF VERMONT

Plaintiff's Brief on Defendant's Motion to Dismiss

EDWARD H. DEAVITT,
Attorney for Plaintiff

PLAINTIFF'S BRIEF ON DEFENDANT'S MOTION TO DISMISS.

ADDITIONAL STATEMENT OF CASE.

In addition to the facts contained in defendant's "Statement of Case" the following and additional facts were found by the referee:

1. That on May 7, 1900, one John Ryan, a creditor of the bankrupt, sued out a writ against the bankrupt, declaring therein in general assumpsit for $500.00, and attached all the bankrupt's livery stock, which attachment was in force until dissolved by bankruptcy proceedings *(Transcript of Record, p. 12.)*

2. That at the time the defendant took possession of the livery property on May 16, 1900, he not only knew that the bankrupt was insolvent, but he also knew of the Ryan attachment of May 7, 1900, knew that the bankrupt was contemplating going into bankruptcy, and he intended by taking possession of the livery property as he did to make it available for the payment of his debt before other complications by way of attachment or bankruptcy arose. *(Transcript of Record, p. 15.)*

There is no finding in the case that the bankrupt "consented that Fairbanks might take possession of the property, not with any intent to prefer him to other creditors, but because he understood that such was his legal right under the mortgage," but the referee did find that although the bankrupt consented that the officer might take and sell the property under the defendant's mortgage yet the arrangement was that the property

was to be sold, and the avails held by the officer in place of the property for whoever turned out to be entitled thereto, and that the bankrupt did not consent that the avails of the sale might be applied on the defendant's debt. *(Transcript of Record, p 16.)*

The Supreme Court of Vermont, however, ignored this finding of the referee in their decision of the case, but treated the case as though the bankrupt gave his full consent and assistance to everything that the defendant did in applying the property to the payment of his debt. *(Transcript of Record, pp. 50, 52, 53.*

ARGUMENT.

The defendant bases his motion to dismiss the plaintiff's writ of error upon the grounds:

1. That this court has no jurisdiction.
2. That no federal question is involved.

One of the class of cases in which United States Revised Statutes, Section 709, provides that the Supreme Court of the United States may review the judgments of State Courts is "where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission or authority."

In this case if the plaintiff specially claimed any title or right by virtue of any statute of the United States, in the State Court, and the decision of the Supreme Court of Vermont, the highest court of that State, was against such title or right, a federal question is involved and this court has jurisdiction.

The plaintiff claims that the case at bar comes within the class of cases above cited, for that in the State Court he, as a Trustee in Bankruptcy of a bankrupt estate appointed and acting under the United States Bankruptcy Law of 1898, made special claim of title and right to a certain sum of money held by the defendant, the same being the avails of certain property formerly belonging to the bankrupt, taken and sold by the defendant within the four months preceding the filing of a petition in bankruptcy by the bankrupt, on the ground that under the provisions of the United States Bankruptcy Law of 1898, 30 Stat. at L. 544, chap. 541, he was entitled to the same as a part of said bankrupt's estate, and the decision of the Supreme Court of Vermont was against the plaintiff's said claim.

One of the plaintiff's claims in the Court below was that the defendant's taking possession of the livery property as he did on May 16, 1900, the same being within four months of the filing of the petition in bankruptcy by the bankrupt, constituted a preference voidable by the plaintiff under sections 60*a* and 60*b* of the United States Bankruptcy Law of 1898.

Another claim was that the defendant's taking possession of the livery property on May 16, 1900, with the consent and assistance of the bankrupt, was a transfer of property void under section 67*e* of the United States Bankruptcy Law of 1898.

Section 60*a* reads as follows:

> "A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his

creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

Section 60*b* reads as follows:

> "If a bankrupt shall have given preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person securing it, or to be benefitted thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

Section 67*e* provides that:

> "That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this Act subsequent to the passage of this Act, and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or incumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors."

Section 3*b* of the Bankruptcy Act provides that a petition in Bankruptcy may be filed against a person who has committed an act of bankruptcy within four months after the commission of such act, and that such time shall not expire until four months after the date of the record-

ing or registering of the transfer or assignment, when the act consists in having made a transfer of any of his property with intent to hinder, delay, or defraud his creditors, or for the purpose of giving a preference, if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes, notorious, exclusive, or continuous possession of the property.

In *Wilson Brothers vs. Nelson, 183, U. S., 191*, this Court held that the Act of 1898 makes the result obtained by the creditor, and not the specific intent of the debtor, the essential fact in what constitutes a preference.

The Supreme Court of Vermont held that the defendant's mortgage of 1891 was a common law chattel mortgage, and that "it was necessary that a change of possession be had to render his title operative against the other creditors of the mortgagor." *(Transcript of Record, p. 52.)*

Although it is true in Vermont, that in the case of a common law chattel mortgage, or of a mortgage covering after acquired property possession of the property must be taken by the mortgagee to perfect his title as against the creditors of the mortgagor, but when possession is taken the property comes under the cover and operation of the mortgage as of its date, still the fact remains that such a mortgage does not become a good and valid mortgage as against the mortgagor's creditors until such possession is taken; that it is not until such possession is taken that the result sought to be secured by such a mortgage is obtained.

Before the State Court the plaintiff contended that construing the provisions of section 3*b* in connection with sections 60*a*, 60*b* and 67*e*, and taking into consideration the fact that the Bankruptcy Law of 1898 aimed at the

result obtained by a creditor from a transfer of his debtor's property, as against the plaintiff, a trustee in bankruptcy, under the Bankruptcy Law of 1898, the transfer of the livery property from the bankrupt to the defendant would date from the day the defendant took possession of the same, May 16, 1900, and not from the date of the mortgage, April 15, 1891.

The decision of the State Court that the taking possession of the property brought it under the cover and operation of the defendant's mortgage as of its date, April 15, 1891, as against the plaintiff, was therefore a decision against a right and title claimed under a United States Statute, and this Court has jurisdiction to review the same.

This same question has been before the Supreme Court of other states, viz., New York, Massachusetts and Missouri, and in each case it was held that the question was a federal question, and that the provisions of the Bankruptcy Law of 1898 governed the date of such transfers, irrespective of what the former holdings of those courts had been

Matthews vs. Hardt, (N. Y.) 79 App. Div. 570.
Tatman vs. Humphrey, 184 Mass 361.
Babbitt vs. Kelley, (Mo.) 70 S. W. Rep. 384.
Landis vs. McDonald, 88 Mo. App. 335.

The plaintiff also claimed in the State Court that as a matter of law there was a finding in the Referee's report that at the time the defendant took possession of the livery property on May 16, 1900, he had reasonable cause to believe that the bankrupt intended thereby to give him a preference, and that the bankrupt delivered

the property to him with the intent on his part to hinder, delay and defraud his other creditors. The decision of the Supreme Court of Vermont on those points was adverse to the plaintiff.

But even if this Court holds that the decision of the Vermont Court that the taking possession of the livery property by the defendant on May 16, 1900, brought it under the cover and operation of the mortgage as of its date, April 15, 1891, as against this plaintiff, is not the decision of a federal question, yet there is a federal question in the case which is necessary to its determination.

Section 67*a* of the Bankruptcy Law provides that, "Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate."

Section 70*a* provides that the trustee of the estate of a bankrupt, upon his appointment and qualification shall be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt to all "(5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him."

On May 7, 1900, several days before the defendant took possession of the livery property under his mortgage, one Ryan, a creditor of the bankrupt, placed an attachment upon all the bankrupt's livery property, and that attachment was good as against the defendant's mortgage.

Rice vs. Courtis, 32 Vt. 460.
Russell vs. Fillmore, 15 Vt. 130.
Kittredge vs. Freeman, 48 Vt. 62.

In the State Court the plaintiff claimed that as Ryan's attachment was rendered null and void, not by the bankrupt filing a petition in bankruptcy, but by the subsequent adjudication in bankruptcy, that at the time the petition was filed, and prior thereto, the defendant's chattel mortgage was not a valid claim as against the claim of Ryan, a creditor of the bankrupt, and the livery property was property which prior to the filing of the petition could have been levied upon and sold under judicial process against the bankrupt, and therefore the same would pass to the plaintiff, as trustee, under sections 67*a* and 70*a* of the Bankruptcy Law. The Supreme Court of Vermont decided against this claim of the plaintiff's by holding that by Ryan's attachment being invalidated by bankruptcy proceedings the defendant's rights under his mortgage of April 15, 1891, stood the same as though there had been no attachment made. *(Transcript of Record, p. 47.)* That decision was against a right and title claimed by the plaintiff under a United States Statute, and this court therefore has jurisdiction to review the same.

As shown by the above claims made by the plaintiff in the State Court, the plaintiff based his title to the fund held by the defendant, solely upon the provisions of the United States Bankruptcy Law of 1898, and the decision of the State Court was against such claim. It has been held by the Supreme Court of the United States that where a trustee in bankruptcy claims certain property as belonging to him under the Bankruptcy Act, and the State Court decides against his title, a Federal question is involved which gives the Supreme Court of the United States jurisdiction to review the decision of the State Court.

Williams vs. Heard, 140 U. S. 529.
Dushane vs. Beall, 161 U. S. 513.

The Federal question was also properly asserted in the state court. Although there is no allegation in the pleadings of the claim of a Federal right further than the allegation in the plaintiff's declaration that he brought this suit as trustee in bankruptcy, yet the Federal questions in the case were presented to the state cou t, and that tribunal took notice of them and passed upon them. Upon this point the Supreme Court of Vermont said.

> "The question then arises whether the defendant by virtue of this mortgage and the taking posession of the property thereunder had a lien on the property taken and sold paramount to the rights of the plaintiff as trustee under the bankrupt law. The plaintiff contends that the defendant did not have a lien valid against creditors under that act, and he seeks to recover the amount received by the defendant from the sale of the property." *(Transcript of Record, p. 48.)*

All that is essential is that the Federal questions must be presented in the State Court in such a manner as to bring them to the attention of that tribunal.

Missouri K. & T. R. Co. vs. Elliott, 184 U. S. 530.

Chicago, B. & Q. R. Co. vs. Chicago, 166 U. S. 266.

F. G. Oxley Stave Co. vs. Butler County, 166 U. S. 648.

And if it appears from the record that the Federal right

so set up and claimed was either expressly denied, or that such was the necessary effect in law of the judgment of the state court, this Court has jurisdiction.

Roby vs. Colehour, 146 U. S. 153.

Chapman vs. Goodnow, 123 U. S. 540.

San Francisco City & County v. Itsell, 133 U. S. 65.

Green Bay & M. Canal Co. vs. Patten Paper Co. 172 U. S. 58.

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